Supreme Court, U.S.
FILED
APR 25 2003

No. 02-1406

In the

Supreme Court of the United States

CALLOWHILL CENTER ASSOCIATES, LLP,

Petitioner,

v.

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB), MARY CRAWLEY TRACY, OLD CITY CIVIC ASSOCIATION and KENSINGTON SOUTH NEIGHBORHOOD ADVISORY COUNCIL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner waived the issues presented for review by not timely raising the issues before the Philadelphia Zoning Board of Adjustment and not filing a cross appeal from the decision of the Zoning Board.

LIST OF PARTIES

The Petitioner, Callowhill Center Associates, LLP, was the Appellant below.

The Respondents who were the Appellees below are as follows:

Society Created to Reduce Urban Blight (SCRUB)

Mary Crawley Tracy

Old City Civic Association

Kensington South Neighborhood Advisory Council

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Statement of the Case

The Petitioner, Callowhill Center Associates, has petitioned for a Writ of Certiorari to this Honorable Court from the December 17, 2002 Order of the Supreme Court of Pennsylvania denying the Petitioner's Petition for Allowance of Appeal. The issues presented by the Petitioner were waived in the Courts below.

The Petitioner wished to place a huge wall wrap sign around a building located at 413-53 North Seventh Street in Philadelphia, Pennsylvania. This wall wrap sign was absolutely prohibited by Philadelphia Zoning Ordinance 14-1604.

The procedural history is as follows: The application by Callowhill Associates for the grant of the wall wrap was denied by the Philadelphia Department of Licenses and Inspections. A timely appeal was taken by Callowhill Associates. A hearing was held before the Philadelphia Zoning Board of Adjustment on February 14, 2001. Subsequently, the Philadelphia, Zoning Board of Adjustment in a four to one decision granted a variance to allow the sign in the captioned matter. A timely appeal to the Court of Common Pleas of Philadelphia County was filed by the Respondents, Society Created to Reduce Urban Blight (SCRUB), Mary Cawley Tracy, Old City Civic Association and the Kensington South Neighborhood Advisory Council. No cross appeal was filed by the Petitioner, Callowhill Associates. The constitutional issues raised presently by Callowhill were not raised before the Zoning Board.

Oral argument on the appeal was heard before the Honorable Matthew Carafiello of the Court of Common Pleas of Philadelphia County on October 17, 2001. By Order dated November 27, 2001 Judge Carafiello reversed the grant of the variance. The

Petitioner, Callowhill Associates, then filed a timely appeal to the Commonwealth Court of Pennsylvania.

Judge Carrafiello specifically held the constitutional issues raised by the Petitioner had been waived. (14A)

The Commonwealth Court of Pennsylvania, by Opinion dated July 11, 2002, agreed that the constitutional issues raised by the Petitioners had been waived.

> "We agree that Applicants waived all arguments not raised before the Board, including the argument that the Zoning Code is unconstitutional." (7A)

The Commonwealth Court affirmed the decision of Judge Carrafiello reversing the Philadelphia Zoning Board's grant of a variance.

The Petitioner, Callowhill Associates, then petitioned for allowance of appeal to the Pennsylvania Supreme Court. By Order dated December 17, 2002, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal. The Petitioner then filed the presently pending Petition for Writ of Certiorari with this Honorable Court.

The facts presented during the hearing with the Philadelphia Zoning Board indicated the proposed wall wrap signed violated numerous provisions of Philadelphia Zoning Ordinance 14-1604. The sign grossly exceeded height and size requirements allowed under Zoning Ordinance 14-1604. Further, the sign was prohibited by Philadelphia Zoning Ordinance 14-1604 because it was within the Vine Street Parking Special Control District: The sign was opposed vigorously by

the pertinent civic associations and groups who now make up the Respondents. The Philadelphia Planning Commission also opposed the sign.

The unrefuted evidence demonstrated the building in question where the wrap around sign was proposed was 70-80% occupied with tenants and the building was advertising for additional tenants. The record demonstrated no real hardship. The record also strongly suggested the sign was against public policy as reflected in Philadelphia Zoning Ordinance 14-1604.

Due to the lack of hardship, Judge Carafiello of the Court of Common Pleas reversed the grant of a variance. The Commonwealth Court affirmed. Both Judge Carafiello and the Commonwealth Court held the wall wrap sign fit within the sign definition of the Philadelphia Zoning Ordinance.

Reasons for Denying the Writ

The Respondents, Society Created to Reduce Urban Blight (SCRUB), Mary Cawley Tracy, Old City Civic Association and Kensington South Neighborhood Advisory Council respectfully request the Petition for Writ of Certiorari be denied since the Petitioner, Callowhill Center Associates, waived the issues presented for review by not timely raising the issues before the Philadelphia Zoning Board of Adjustment or by not filing a cross appeal.

The Court of Common Pleas of Philadelphia County agreed and held the constitutional issues presently sought to be raised were waived.

> "As their arguments regarding the constitutionality of the controls

> established by the Code were not raised before the ZBA, nor were they the subject of the appeal before the Court, as well as the Court's belief that they lack merit, they are deemed waived for purposes of this appeal." (14A)

The Commonwealth Court of Pennsylvania agreed the Petitioner, Callowhill Associates waived the issues presented in this Petition for Writ of Certiorari.

> "We agree that Applicants waived all arguments not raised before the Board, including the argument that the zoning code is unconstitutional." (7A)

The Supreme Court of Pennsylvania denied the Petitioner's Request for Allowance of Appeal.

Therefore, there is nothing for this Honorable Court to decide. The lower courts did not address the present constitutional issues due to waiver. The Honorable Court should also dismiss this Petition for Writ of Certiorari since these issues were fully waived and not validly before this Honorable Court.

Conclusion

The Respondents, SCRUB, et al., respectfully requests the Petition for Writ of Certiorari be denied since the issues were waived in the courts below.

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